NO. 81-6338

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KEITH FAIR,

Petitioner,

v.

WALTER D. ZANT,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether or not Petitioner's plea of guilty to the offense of murder was voluntarily and intelligently entered when there is no question about the reliability or truthfulness of his sworn admissions of guilt in open court, when the trial judge and Petitioner's own counsel thoroughly and fully advised him of his constitutional rights, but when defense counsel erroneously advised him pertaining to his right to withdraw his plea following oral announcement of sentence?

II.

Whether or not the trial court's refusal to allow Petitioner to withdraw his guilty plea after pronouncement of sentence, and the Georgia Supreme Court's affirmance of said ruling, operated to deprive Petitioner of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution?

III.

Whether the evidence presented during Petitioner's sentencing hearing was sufficient to support a finding of a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2), when the murder in the instant case had been perpetrated to eliminate an eyewitness to another murder which Petitioner had committed earlier on the same evening?

IV.

Whether or not Petitioner's perpetration of a previous murder, which was proven beyond a reasonable doubt in the instant case during the sentencing phase of Petitioner's bifurcated guilty plea hearing, may still remain a aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2), when Petitioner was later tried before a jury in another county, and was acquitted of said previous murder?

V.

Whether the evidence presented during the sentencing phase of Petitioner's bifurcated guilty plea hearing was sufficient to support the trial judge's finding of statutory aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(7) when the trial judge made no specific finding that the victim suffered torture or aggravated battery.

VI.

Whether or not the state prosecutors withheld favorable, impeaching evidence concerning one of the State's witnesses during the sentencing phase of Petitioner's bifurcated guilty plea proceeding, in violation of Petitioner's due process rights?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Keith Fair, was indicted by the July Term, 1979 Hall County, Georgia Grand Jury for the shooting murder of Jackie Morris which had occurred on May 9, 1979. Petitioner pled guilty on August 14, 1979 and following a two day sentencing hearing the trial court imposed the death penalty finding the existence of two statutory aggravating circumstances under Ga. Code Ann.§§ 27-2534.1(b)(2) and (b)(7). Petitioner's conviction and sentence were affirmed by the Georgia Supreme Court on direct appeal, and this Court thereafter denied his original petition for a writ of certiorari and petition for rehearing. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. den., 449 U.S. 986 (1981), rehng. den., 449 U.S. 1104 (1981).

Following the denial of the petition for certiorari and rehearing, a new execution date was set for June 9, 1981. Petitioner then filed on June 5, 1981 in the Superior Court of Butts County, Georgia a request for a stay of execution and petition for habeas corpus. Following an evidentiary hearing which was held on July 14, 1981 in the Superior Court of Butts County, Georgia state habeas corpus relief was denied in an order filed on October 21, 1981. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on January 6, 1982. Thereafter, Petitioner filed this second petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

On August 14, 1979, the Petitioner and his attorneys appeared in the Superior Court of Hall County, Georgia to enter Petitioner's plea of guilty to the murder of Jackie Morris. Recognizing the gravity of the crime the trial court meticulously questioned the Petitioner during the hearing to insure that his plea was freely and voluntarily entered, with full knowledge of the consequences of said plea. (T. 5-16).[1/] After ascertaining that Petitioner was not under the influence of drugs or alcohol, the trial judge read the formal charges to the Petitioner and asked him if he had sufficient time to discuss the case with his attorneys. (T. 5-6). At the guilty plea hearing, and later at the state habeas corpus hearing, the Petitioner indicated that he and his attorneys had gone over and discussed a detailed guilty plea petition which fully advised him of all of his constitutional rights, indicated that he had not been coerced, threatened nor induced into entering his plea and which additionally advised him that the maximum punishment which he could receive for the offense was death by electrocution. (T. 6-7, HT. 59, 65, 22). It was established at the plea hearing beyond any doubt that Petitioner was fully aware that the trial court had the authority under Georgia law to impose the death penalty upon a guilty plea, and that the trial judge was not conscientiously opposed to capital punishment. (T. 10-13). Petitioner also indicated his

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1/ References to the pagination of the transcript of Petitioner's guilty plea and sentencing hearing in the Superior Court of Hall County, Georgia shall be referred to in this brief as (T. ____). References to the pagination of the habeas corpus transcript from the Superior Court of Butts County, Georgia shall be referred to as (HT. ___).

awareness that there was no plea bargain in existence between himself or his attorneys and the district attorney, relating to the sentence which might be imposed following his plea. (T. 11). With full knowledge that he was leaving his fate in the hands of the trial judge, the Petitioner expressed his desire to enter his plea of guilty. (T. 18-20). In his own words at the plea hearing, the Petitioner admitted that he had shot Jackie Morris in the head three times with a .22 caliber pistol, and his only explanation was that they were drunk and had a little argument. (T. 15).

Following the acceptance of Petitioner's guilty plea, the trial court heard testimony from twenty-one witnesses on the issue of punishment. Testimony was extensive, covering two days and approximately 400 pages in the transcript. The testimony established overwhelmingly, and beyond any scintilla of doubt, that the murder of Jackie Morris resulted from the Petitioner's attempt to conceal another murder which he had committed earlier that same night in Habersham County, Georgia. This was the murder of Edmond Hoyt Turner, alias "Beetle" Turner.

At this juncture it should be noted that at the time of the Petitioner's plea, he stood accused of murdering both Jackie Morris in Hall County, Georgia and "Beetle" Turner in Habersham County, Georgia. Hall and Habersham Counties are in different judicial circuits, and are served by different district attorneys. Although Petitioner stood indicted in Habersham County for the murder of Turner, that case had not been called to trial at the time of Petitioner's guilty plea in Hall County, Georgia to the murder of Morris. Prior to the

sentencing phase of Petitioner's bifurcated guilty plea proceeding, Petitioner's attorneys had been served with notice and were aware that the Hall County District Attorney in this case, intended to use evidence of the Habersham County murder as an aggravating circumstance in support of the death penalty.

The state's evidence during the sentencing phase showed that the Petitioner and several other individuals had congregated at the home of Dexter Thomas on the evening of May 8, 1977. Present were the Petitioner, Becky Nations (Petitioner's girl-friend), Jackie Morris, Sherill Land, and Dexter Thomas. (T. 91-92, 163-165, 192). "Beetle" Turner (the victim in the Habersham County murder) arrived a short time after the others. Witnesses stated that Turner apparently had recently been released from jail, and was angry at an individual named Morgan Whitlock, because Whitlock had been instrumental in Turner's being jailed. Earlier on May 8, 1977, Turner had been in a confrontation with Whitlock, had threatened him, and told Whitlock that he would return that evening. (T. 96-98).

Eventually, "Beetle" Turner, Jackie Morris, Dexter Thomas and the Petitioner left the Thomas house. (T. 194). Evidence was presented which showed that Turner gave the Petitioner a pistol, and had offered him some money in exchange for his help in burning Whitlock's trailer. Upon arriving at the trailer, the group found that Whitlock was absent, and the Petitioner and Jackie Morris then set the trailer on fire. (T. 103, 199).

After leaving Whitlock's place, the Petitioner told Turner that he wanted his money. (T. 199). Turner said he did not have

it at that time, but he would cash a check. (T. 199). Melody Tethrow, who worked at a local country store, confirmed that Turner had requested that she cash a $200.00 check, but she had only been able to cash a $100.00 check. (T. 87).

Fair and Turner continued to argue about the money as the group traveled in Morris' automobile with Fair driving. The argument climaxed when, after stopping the car, Fair shot Turner in the face without any warning. As described by eyewitnesses, Dexter Thomas, Turner and Fair had been arguing about the money and finally Turner stated, "I'll get you some more money after a while." Fair responded, "I'm getting tired of hearing your damn mouth run, you won't pay your debts or nothing . . . I'll teach you." At this point, the Petitioner drew the pistol, reached through the automobile window where Turner was sitting, and fired point blank into Turner's face. Fair then reached in, grabbed Turner by the hair, pulled him out onto the ground, laughed and again shot him in the head. (T. 201-202).

Testimony from a medical examiner and from a ballistics expert confirmed that the pistol was fired from between two and six inches from Turner's face. (T. 114, 117, 156-158).

After Turner had been shot, Fair directed the other two occupants of the vehicle to place Turner's body into the trunk of Morris' automobile. (T. 203). Petitioner now faced the problem of disposing of Turner's body, and doing something about Morris' bloodstained automobile. The trio returned to Thomas' house where they changed clothes. (T. 203-204, 249). At the Thomas' residence, the Petitioner, Morris and Thomas confided in Becky Nations and Sherill Land about Fair shooting Turner. (T. 167, 250).

After Fair changed clothes, he and Becky Nations left in their car, while Dexter Thomas and Sherill Land drove Turner's truck. Jackie Morris drove his bloodstained Mustang with Turner's body still hidden in the trunk. The plan was to dispose of Turner's body in a nearby lake. (T. 250-252).

Upon arriving at the lake, Turner's body was loaded onto his truck at the direction of the Petitioner, and the truck was driven into the water. (T. 167-168, 206-207, 252-253).

After Turner's body was disposed of, the five individuals headed towards Gainesville, Georgia. Dexter Thomas rode with Fair and Becky Nations, while Sherill Land rode with Jackie Morris in his Mustang. (T. 207). On the way to Gainesville, Fair asked Thomas, "Reckon what I ought to do with Jackie [Morris]." (T. 209). Thomas claimed to have suggested nothing, since Morris indicated he was going to burn his automobile. (T. 209). Fair, however, had other plans.

After arriving in Gainesville, Georgia, Thomas, Morris and Sherill Land remained at a Huddle House restaurant, while Fair and Becky Nations left, supposedly to get another car because his was too loud. (T. 207, 210). Fair and Becky drove to a mobile home owned by Bradley Highfield. Fair admitted that he had blood on his shirt upon arriving at Highfield's trailer. (T. 439). Highfield also testified that Fair had blood on him when he arrived at the trailer, and Fair also stated he was in a "little trouble" and needed a ride. (T. 288-290).

Eventually, Fair, Highfield and Nations left Highfield's mobile home. Fair was now driving Highfield's Volkswagon. Nations was in the back seat, and heard part of a conversation

wherein Fair and Highfield discussed that Jackie Morris would have to be killed because Morris had been "a rat in prison." (T. 171). Later, after the shooting of Morris, Sherill Land also heard Fair remark that Morris had been a "ratting S.O.B. on the chain gang." (T. 271-272).

Because Fair and Nations were late returning to the Huddle House, Morris, Thomas and Sherill Land left and headed towards home. (T. 210). Fair, Highfield and Nations soon caught up with the other three on the highway. (T. 210-211). With Fair leading the way in Highfield's Volkswagon, the group traveled over some dirt roads and finally stopped, supposedly, to burn Morris' automobile. (T. 256-257). It was at this location that Fair finally murdered Jackie Morris. (T. 211-215, 257-260, 296, 412-418).

While Morris was working at removing the rear tire of his automobile, in an attempt to make the car look like it had been stripped, Fair pulled his pistol, and shot the kneeling Morris in the head three times. (T. 15, 259). Although Fair contended that the shooting was not planned, and that he and Morris had been arguing, (T. 414); according to witness Sherill Land, who was standing nearby, "They wasn't even fussing." (T. 272). After Fair shot Morris, he laughed and said something about Morris being a rat, and that Morris had pulled a knife on the Petitioner when he was thirteen years old. (T. 215, 272). There was also evidence which tended to show that following the shots, Thomas participated by cutting Morris' throat with a knife. (T. 229, 418, 421). The Petitioner and Thomas then put Morris' body in the automobile, and set it on fire. (T. 213-217, 258-259).

Morris' burned car, and the thirty-nine inches of his charred remains were found the next morning. (T. 47, 57, 58, 126). The next day, "Beetle" Turner and his truck were found at the lake. (T. 73-76). A ballistics expert testified that the bullets taken from Morris, Turner, and from the gas tank of Morris' automobile, were probably all fired from the same weapon. (T. 157-158).

Although Fair contended that the shooting of Morris occurred as the result of an argument, the state's evidence from several witnesses, as previously pointed out, showed that the elimination of Morris was preplanned, because of Morris' alleged propensity to talk. At trial the Petitioner contended that he was sorry for his deed, saying that, "Nobody deserved nothing like that." (T. 424). The state's evidence established that Fair's sorrow was newly acquired.

After Fair's arrest he escaped from the Forsyth County jail. (T. 423-425, 357-358). The state called as witnesses, some of the men who had been Fair's former fellow inmates at the jail. One individual stated that Fair showed him the autopsy report on Jackie Morris. Fair then discussed the killing and told about a man with, "lead in his head," that had been driven into the lake. (T. 329-332). Fair also told that inmate he planned to eliminate the other witnesses. (T. 331-333). Without indicating any remorse, Fair appeared to be trying to impress the other inmates. (T. 336).

Another inmate who had been in Forsyth County jail with Fair, also stated that Fair had commented about there only being thirty-nine inches left of Morris' body. Fair also

told this inmate that he was not sorry, and that he had lost no sleep over it. (T. 339-341).

An individual who had escaped from the jail with Fair stated that Fair had also talked to him about the thirty-nine inch remains of Morris, and told about the killing and the disposal of the bodies of both Morris and Turner. Fair freely admitted killing both men. (T. 357-360). While on escape Fair made a phone call stating that the victims, "deserved it." (T. 361). At the sentencing hearing Fair admitted talking to these people, but denied making many of the statements attributed to him. (T. 434, 437).

After hearing the evidence and deliberating overnight, the trial judge found that the aggravating circumstances were supported by the evidence beyond a reasonable doubt thus justifying the imposition of the death penalty. The judge found that the murder of Jackie Morris was committed while the Petitioner was engaged in the commission of another capital felony, to wit: the murder of "Beetle" Turner. [Ga. Code Ann. § 27-2534.1(b)(2)]. The judge also found that the murder of Jackie Morris had been outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the Petitioner. [Ga. Code Ann. § 27-2534.1(b)(7)]. (T. 492; R. 98).

Immediately following the court's oral announcement of the sentence, Petitioner's defense counsel attempted to withdraw the Petitioner's plea of guilty. (T. 484). After extensive argument, the trial judge eventually denied the request for withdrawal. (T. 491).

It should also be noted at this point, that approximately three months after Petitioner's conviction and sentence in Hall County for the murder of Jackie Morris, he was actually tried in the Superior Court of Habersham County for the murder of "Beetle" Turner, and was subsequently acquitted. The Habersham County transcript has not been made a part of the record in this case. It is clear that the Habersham case was tried before a different trier of fact, with a different prosecutor, and with a different defense attorney. It cannot be assumed that all of the evidence was the same at both proceedings.

Additional facts may be related in the following portion of this brief to more fully explain Respondent's arguments against issuance of the writ.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S PLEA OF GUILTY WAS FREELY, VOLUNTARILY AND INTELLIGENTLY ENTERED.

There appears to be no contradiction of facts pertaining to the circumstances surrounding the entry of Mr. Fair's plea of guilty in the Superior Court of Hall County, Georgia. In the Butts County, Georgia habeas corpus proceeding, Petitioner Fair raised the issue challenging the voluntary and intelligent nature of his plea, basing his argument upon evidence which showed that both of Petitioner's trial counsel, George Brinson and Michael Casper, had advised the Petitioner that even if a death sentence were imposed by the trial judge following the guilty plea, the Petitioner could still withdraw his plea and opt for a jury trial. As is reflected in the opinion of the Georgia Supreme Court in Fair v. State, supra, 245 Ga. at p. 875-876, this advice was based on an erroneous misinterpretation of Ga. Code Ann. § 27-1404. That Code Section provides in relevant part as follows:

> . . . If [a defendant] shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the

> prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial.

The state habeas court had before it the testimony of both of Petitioner's trial attorneys, the testimony of the Petitioner and of course the record of Petitioner's plea hearing in the Superior Court of Hall County.

The record of the plea hearing, and the testimony of Petitioner and his attorneys demonstrated that his attorneys had thoroughly investigated the case, and had spent over 100 hours interviewing the Petitioner, various witnesses, the prosecuting attorneys and engaging in legal research. (HT. 19, 21, 23). Defense counsel's investigation, review of the prosecution file, and discussions with the district attorney led them to conclude that the state had an air-tight case against the Petitioner, and that his chances of acquittal were minimal. (HT. 19, 57, 63-64, 65). Defense counsel had also been advised that the state was seeking the death penalty in Petitioner's case. (R. 32).

In light of the overwhelming evidence against the Petitioner, defense counsel devised a plan which they surmised would provide him with the best opportunity for receiving a life sentence rather than a death penalty. After advising Fair of the evidence which the state was prepared to offer, defense counsel also advised him that if he plead guilty he stood a better chance of receiving a life sentence, and even if the trial judge imposed a death penalty, defense counsel could withdraw the guilty plea and later proceed to a jury trial. (HT. 10-12, 19, 53, 55).

At the plea hearing, Petitioner informed the trial judge that his attorneys had previously gone over a detailed guilty plea petition with him which covered numerous, specific questions to insure the voluntary and intelligent nature of the plea. (T. 6-7; R. 90-91). (See Appendix A to this Brief in Opposition). At the state habeas hearing in the Superior Court of Butts County and at the guilty plea hearing in Hall County, Georgia, Petitioner admitted his attorneys had gone over the guilty plea form with him, and that he understood it and had signed it. (T. 6; HT. 22, 59, 65). At the plea hearing itself, Petitioner stated that he understood the charges against him, and had fully discussed the case of with his attorneys. (T. 7-8). The trial judge, on the record, advised Petitioner of his right to plead not guilty and remain silent, his right to a public trial by jury, and his right to confront and call witnesses. (T. 8-9). The trial judge also explained that the Petitioner had the option of not testifying at trial and placing the burden upon the state to prove its case. (T. 9). Pertaining to Petitioner's sentence, the trial judge advised him that he could impose the same sentence as if the Petitioner was tried by a jury, and specifically informed Petitioner that he could be sentenced to death. (T. 10). The Petitioner affirmed on the record that there had been no threats or promises made to induce his plea, and further stated that no one, including his attorneys, had suggested or represented to him that he would not receive the death penalty because he pled guilty. The trial judge advised him that he was not opposed to capital punishment. (T. 10-11, 14).

The Petitioner admitted on the record that he had killed Jackie Morris by shooting him three times in the head, and he further described the details of the shooting. (T. 11, 15-16). Based on all of the aforesaid, the trial court accepted the Petitioner's plea of guilty. (T. 19). (See, Appendix B to this Brief in Opposition).

It is axiomatic that a guilty plea is invalid unless it is intelligently and voluntarily entered by defendant. Boykin v. Alabama, 395 U.S. 238, 242 (1969). However, a plea is not rendered invalid, because it represents a compromise by the defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment. Brady v. United States, 397 U.S. 742 (1970); United States v. Sepe, 474 F.2d 784 (5th Cir. 1973), aff'd en banc, 486 F.2d 1084 (5th Cir. 1974). The relevant constitutional standard is, "whether the plea represents a voluntary and intelligent choice among the alternative courses open to the defendant." North Carolina v. Alford, 400 U.S. 25, 37 (1970); Parker v. North Carolina, 397 U.S. 790, 795-796 (1970).

This court has previously recognized that a plea is not necessarily unintelligently or involuntarily entered simply because the advice of defense counsel may be proven wrong in retrospect. In McMann v. Richardson, 397 U.S. 759 (1970), the court refused to affirm the granting of habeas corpus relief to petitioners who had argued that their pleas of guilty had been induced by allegedly coerced confessions, and as a result of the advice from their attorneys that the confessions would have been admissible at the trial. Recognizing that waiving trial entails the inherent risk that the good

faith evaluations of reasonably competent counsel, may be mistaken either as to the facts or as to what the court's judgment will be on given facts, this Court held that absent attorney advice which fell below that range of competence generally demanded of attorneys in criminal cases, habeas corpus relief would not be granted. Id. at p. 770-771. Whether a guilty plea is intelligent does not require that all attorney advice be able to withstand retrospective scrutiny. Id. at p. 770. Likewise, in Brady v. United States, 397 U.S. 742 (1970), this Court held that a guilty plea had been intelligently entered notwithstanding defense counsel's advice which proved, nine years later, to be erroneous. In that case, defense counsel had advised the defendant that if he went to trial there was a possibility of receiving a death penalty, while under a plea of guilty he could only receive a life sentence. United States v. Jackson, 390 U.S. 570 (1968) which was decided nine years after the defendant in Brady had pled guilty, prohibited the imposition of the death penalty under such circumstances. This Court in Brady focused upon the truth and reliability of the defendant's plea which was not impugned by what ultimately was determined to be erroneous advice from defense counsel.

The Petitioner in the instant case, similar to the Petitioner in Brady, was aware of precisely what he was doing when he admitted in court that he had killed Jackie Morris by shooting him three times in the head. Also, as in Brady, Petitioner Fair was motivated by the strength of the prosecution's case, and the likelihood that he would receive the death penalty

following a jury trial. (HT. 60). Faced with this strong possibility, the Petitioner knowingly and intelligently opted to place his faith in the hands of the trial judge. As this court has noted:

> Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vunerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), a voluntary plea of guilty intelligently made in light of the then applicable law does not become vunerable because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, supra at p. 756-757.

In the instant case, defense counsel's advice to the Petitioner that he would be permitted to withdraw his plea, was premised upon what defense counsel had construed to be the existing law in Georgia. In its opinion on direct appeal in Fair v. State, supra the Georgia Supreme Court, in actually a case of first impression, ultimately held that defense counsel's interpretation of the relied upon, aforesaid Georgia Code provision was erroneous. Defense counsel's advice to the Petitioner in no way affected the reliability of the plea which ultimately was supported by overwhelming evidence that was introduced by the state during the sentencing phase of the proceeding. Petitioner pled guilty knowing full well that he could receive the death sentence for his action. In court he was advised that by pleading guilty he would be waiving his right to a jury trial. When all of the aforesaid is considered, Respondent respectfully submits that there is no merit to Petitioner's assertions that his plea was not freely, voluntarily or intelligently entered.

II. THE SUPERIOR COURT OF HALL COUNTY AND THE GEORGIA SUPREME COURT ON DIRECT APPEAL PROPERLY RULED THAT THE PETITIONER HAD NO RIGHT TO WITHDRAW HIS GUILTY PLEA AFTER ORAL SENTENCE HAD BEEN PRONOUNCED, AND SAID RULINGS DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Petitioner's second argument urging issuance of the writ in the instant case, contends that the Georgia Supreme Court's interpretation of Ga. Code Ann. § 27-1404 as applied

to Petitioner's case has violated Petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. This same argument was previously made by the Petitioner in his initial petition for a writ of certiorari following the affirmance of his conviction on direct appeal to the Georgia Supreme Court. See Fair v. Georgia, United States Supreme Court Case No. 79-6884. As has previously been noted, this Court denied certiorari on this first petition. Fair v. Georgia, 449 U.S. 986 (1981), rehng. den., 449 U.S. 1104 (1981). Petitioner has expounded no new arguments which would now justify the granting of his petition on this issue.

As has been noted in the previous statement of facts, the Petitioner attempted to withdraw his plea of guilty following the trial court's oral announcement of the death sentence. The withdrawal was made prior to the trial court's signing the sentence and filing it with the Clerk of the Court. This attempted withdrawal was based upon Ga. Code Ann. § 27-1404, supra.

In its opinion in this case, the Georgia Supreme Court cited its prior holding in Smith v. State, 231 Ga. 23, 200 S.E.2d 119 (1973), which recognized that, "[t]he purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure . . ." Fair v. State, supra at p. 877. The court properly rationalized that when a guilty plea is entered in a capital case, and it is clear that the state is seeking the death penalty, the withdrawal provisions of Ga. Code Ann. § 27-1404 have no rational purpose, and in effect would operate to completely frustrate Ga. Code Ann. § 27-2528, which specifically authorizes a trial judge

to impose the death sentence upon a plea of guilty. [See, Ga. Laws 1973, p. 159, 162).

Although Petitioner argues that he had an established right to withdraw his plea under Ga. Code Ann. § 27-1404 prior to the trial judge's signing and filing his sentence, it is clear that Petitioner is relying upon opinions from the Georgia Court of Appeals, which did not deal with capital crimes, and which did not deal with the conflict between Ga. Code Ann. § 27-1404 and Ga. Laws 1973, p. 159, et seq., which provided a new, comprehensive procedure in capital felony cases. The Georgia Court of Appeals had never interpreted Code § 27-1404 in a death penalty case, because all such appeals are directed to the Georgia Supreme Court. Ga. Const., Art. VI, Sec. II, Para IV; Ga. Code Ann. § 2-3104. Not only had the Georgia Supreme Court never before interpreted the withdrawal provisions of Ga. Code Ann. § 27-1404 in light of Georgia statutory procedure for the imposition of the death penalty, the Georgia Supreme Court also had never specifically addressed itself to the interpretation of the term, "pronouncement," as used in the aforesaid Code Section. Thus, as the Georgia Supreme Court noted in its opinion, the question before it was clearly one of first impression. In Petitioner's direct appeal, the Georgia Supreme Court also stated that nothing in its opinion ". . . should be construed as approval by the court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is already pronounced." Fair v. State, supra, at p. 878, fn. 5.

In fact, contrary to Petitioner's assertion in his brief, a non-capital defendant does not have more rights than a capital

defendant in regards to his right to withdraw a guilty plea. In State v. Germany, 246 Ga. 455, 271 S.E.2d 851 (1980) the Georgia Supreme Court specifically held that the term pronouncement as utilized in Ga. Code Ann. § 27-1404 means oral pronouncement, and that a defendant does not have an absolute, statutory right under said Code Section to withdraw his guilty plea after said oral pronouncement.

Respondent again stresses that in the instant case, the Petitioner was thoroughly questioned by the trial court prior to the acceptance of the guilty plea, and the judge informed the Petitioner that he was not conscientiously opposed to capital punishment, and that if the circumstances and evidence warranted, the death penalty might be imposed. Knowing this, the Petitioner still chose to plead guilty, and in his own words admitted shooting Jackie Morris in the head three times. A two day, extensive sentencing hearing followed and the Petitioner made no attempt to withdraw his plea even after hearing the volumnious amount of evidence which the state had amassed against him. No attempt was made to withdraw the plea until the planned action was taken by counsel immediately after the judge orally announced his sentence in open court.

This Court has recognized that judicial decisions may operate in a ex post facto fashion so as to deprive a criminal defendant of his due process rights. See Bouie v. Columbia, 378 U.S. 347 (1964). However, in both Bouie and in Bunkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930), cited by the Petitioner, the judicial decisions of the state supreme courts had been clearly contra to said state supreme courts' prior decisions on the same issues. See, Bouie v. Columbia, supra at p. 356, Bunkerhoff-Faris Trust & Savings Company v. Hill, supra at p. 676.

In the present case the Georgia Supreme Court had never before addressed the precise issue which was before it, and as noted earlier, neither the Georgia Supreme Court nor the Georgia Court of Appeals had ever interpreted Ga. Code Ann. § 27-1404 in light of Georgia's new statutory procedure for the imposition of the death penalty. Neither had the Georgia Supreme Court ever interpreted the statutory terminology of Code § 27-1404. Since the issues were questions of statutory and procedural questions never before addressed by the highest court in the State of Georgia, the Georgia Supreme Court's decision did not deprive the Petitioner of an established, procedural right or due process of law.

In conclusion, for all of the aforesaid reasons, this Court should decline to grant the writ of certiorari to review the issue raised in Petitioner's second argument.

III. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY PROCEDURES, AND PROPERLY AFFIRMED THE TRIAL JUDGE'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(2) AND (b)(7) TO WARRANT THE IMPOSITION OF THE DEATH SENTENCE.

As is the case with Petitioner's previous argument, his third argument (and his third and fourth issues presented), were raised in Petitioner's initial petition for a writ of certiorari which was denied. Fair v. Georgia, supra. Also, as with his previous argument, Petitioner's assertions challenging his death sentence under Ga. Code Ann. § 27-2534.1(b)(2) and (b)(7), as set out in the instant petition are insufficient to justify this Court's reaching a decision on the issuance of the writ which is different from this Court's initial determination which denied same.

The first portion of Petitioner's argument challenges the imposition of his death sentence under Georgia's (b)(2) aggravating circumstance. His reference to Godfrey v. Georgia, 446 U.S. 420 (1980) pertaining to this issue is clearly unmeritorious since in Godfrey the only aggravating circumstance dealt with was Ga. Code Ann. § 27-2534.1(b)(7). The (b)(2) aggravating circumstance was not found by the jury in that case and was not discussed

either by the Georgia Supreme Court or in this Court's opinion.

Petitioner's attack upon the trial judge's finding of the (b)(2) aggravating circumstance is twofold. First, he asserts that his crime does not fit within the restrictions of the statute which requires the murder to occur while the offender was engaged in the commission of another capital felony.[2/] As is evident from the aforesaid statement of facts, there was an overwhelming amount of evidence presented to the trial judge in the instant case, which amply proved beyond any scintilla of doubt that the murder of Jackie Morris had been perpetrated by the Petitioner to cover his prior murder of Beetle Turner. This was specifically found by the Georgia Supreme Court on its direct appeal of Petitioner's conviction. Fair v. State, supra at p. 871. Petitioner notes in his brief at page 17 that in his concurring opinion in Gregg v. Georgia, 428 U.S. 153 (1976), Justice White recognized that the purpose behind the (b)(2) aggravating circumstance is to allow the state to seek the death penalty in "witness-elimination" murders. Id. at p. 221, fn. 10. Petitioner also contends that the import of Justice White's remark in Gregg is that a necessary condition for a fulfillment of the conditions of the (b)(2) aggravating circumstance is that the defendant has killed someone to avoid being identified as the perpetrator of another crime. Petitioner's Brief at p. 17. That is exactly what happened in this case. As may be ascertained from the aforesaid statement of facts, the Petitioner killed Jackie Morris because Morris had witnessed the Petitioner's

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2/ Under Ga. Code Ann. § 27-2534.1(b)(2) the death penalty may be imposed upon a finding that, "The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

execution of Beetle Turner,and because Petitioner was afraid that Morris would eventually talk. The facts of this case specifically fall within the circumstances which the Georgia General Assembly intended to cover when it enacted the (b)(2) aggravating circumstance. In affirming the (b)(2) aggravating circumstance in the instant case, the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and to give that intent to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

Petitioner also argues that the (b)(2) aggravating circumstance was erroneously applied in this case, because Petitioner was eventually acquitted in Habersham County, Georgia for the murder of Turner. The law is clear in Georgia that Ga. Code Ann. § 27-2534.1(b)(2) does not require a conviction before the trier of fact may find the supporting additional capital felony as an aggravating circumstance authorizing the death penalty. Fair v. State, supra at p. 870; Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974), sentence vacated on other grounds, 433 U.S. 917 (1977).

This Court has recognized that during sentence determination in a capital felony case, the trier of fact should consider a broad spectrum of circumstances including such things as the character of the accused, his past record and all of the circumstances surrounding the particular offense. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 284 (1976).

In the instant case, Fair was charged with two separate murders in two separate counties, and was tried before two distinct judicial bodies. The trial judge in Hall County in finding beyond a reasonable doubt that the Petitioner had committed the murder of Beetle Turner, had the opportunity to consider evidence which may not have necessarily been admissible during the guilt/innocence phase of Petitioner's trial before a jury in Habersham County. The record in the courts below do not reflect what evidence was presented to the Habersham County jury which subsequently acquitted Petitioner of the Beetle Turner murder. Additionally, Petitioner's acquittal in Habersham County only demonstrates that the prosecutor in that case failed to prove beyond a reasonable doubt that Fair had murdered Turner. It does not necessarily follow that such a deficiency in proof existed in Hall County, and indeed, a review of the record below shows an overwhelming amount of evidence supporting Petitioner's guilt in both murders. In its addendum opinion, the Georgia Supreme Court referred to the recent decision of this Court in Standefer v. United States, ___U.S.___, 100 S.Ct. 1999 (1980), and the following language which is relevant to this case:

> This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U.S. 476, 492 (1957). While symmetry of results may be intellectually satisfying,

it is not required. Standefer v. United States, 100 S.Ct. at p. 2008-2009.

Here, Petitioner argues that the death penalty under (b)(2) aggravating circumstance may not stand in light of Petitioner's acquittal for the murder of Beetle Turner, because of the necessity for greater reliability required in death penalty cases. Respondent submits that the reliability of the trial judge's finding in this case is beyond question, as is evidenced by the facts set out previously. Petitioner is asking this Court to speculate as to why he was acquitted in Habersham County, when in fact the evidence in Hall County supporting the aggravating circumstance was overwhelming. This Court should refuse to engage in such speculation, and should deny Petitioner's request to review his death penalty under the (b)(2) aggravating circumstance.

Petitioner also contends that his death penalty under the (b)(7) aggravating circumstance has been unconstitutionally imposed and affirmed by the Georgia Supreme Court, because of the trial court's lack of a finding of aggravated battery or torture to the victim. As has previously been noted, there were two statutory aggravating circumstances found to exist by the trial judge. The (b)(7) aggravating circumstance was that the murder of Jackie Morris had been vile, horrible or inhuman in that it involved depravity of mind on the part of the Petitioner. (R. 98).

As this Court is well aware, Georgia's seventh aggravating circumstance authorizes the jury, or the trial judge when the case is tried without a jury, to impose the death penalty when

it finds beyond a reasonable doubt that: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1 (b)(7). This Court has noted the Georgia Supreme Court's recognition of its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[3/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), the Georgia Supreme Court has stated that it has no intention of permitting that Code Section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 822 (1977). The Georgia Supreme Court further stated in Harris, its intention to restrict its approval of death sentences supported by Code Section 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundary, but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the previous statement of facts amply demonstrate, the circumstances surrounding the murder of Jackie Morris fall well within the purview of the (b)(7) aggravating circumstance,

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3/ Under Ga. Code Ann. § 27-2537(c), the Georgia Supreme Court must review all death penalty cases to determine:

> Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) Whether in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b) and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

in that they demonstrate beyond any doubt the wanton, vile and inhuman nature of the murder and the depravity of mind of the Petitioner.

In reviewing this case, the Georgia Supreme Court specifically interpreted the (b)(7) aggravating circumstance in light of the Petitioner's arguments on appeal that the death penalty could not be supported without a finding of torture or aggravated battery. The Georgia Supreme Court explicitly stated that the disjunctive phraseology of the statute requires only that at least one phrase of the first portion of the statute exists due to a finding of at least one phrase of the second clause of the statute. Fair v. State, supra at p. 872. Contrary to Petitioner's contentions, this was not a novel interpretation of the (b)(7) aggravating circumstance. The Georgia Supreme Court also noted that it had upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130, 140-141, 240 S.E.2d 694 (1977). It is axiomatic that this Court will not construe a state statute contrary to the construction given it by the highest court of said state. O'Brien v. Skinner, 414 U.S. 531 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974).

Also contrary to the position of the Petitioner, this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) does not require a finding of torture or aggravated battery before the death penalty may be imposed. In fact, the plurality opinion specifically reviewed the evidence to determine whether Godfrey's death sentence could have been supported by a finding that the murders in that case had been outrageously or wantonly vile, horrible or inhuman in that they involved simply depravity of

mind. This Court found that the defendant in Godfrey could not have been said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. The victims in Godfrey were killed instantly, they were members of the defendant's family who had caused him extreme emotional trauma, and shortly after the killings, the defendant acknowledged his responsibility for the heinous nature of the crime.

In its addendum opinion in Fair v. State, supra at p. 879-881, the Georgia Supreme Court specifically reviewed Petitioner's death sentence in light of Godfrey. The Georgia Court noted, and it is also apparent from the aforesaid statement of facts, that there are numerous distinguishing factors between Godfrey and the instant case. The victim in this case, Jackie Morris, was killed by the Petitioner as a result of the Petitioner's planned, cold-blooded attempt to eliminate Morris as a witness, and to cover up his previous murder of Beetle Turner. Aside from shooting Morris in the head at point-blank range, there was evidence showing that Petitioner's accomplice had cut the victim's throat. The victim's body was burned and mutilated after the killing. The court specifically noted that, "aside from laughing during the killing itself, the Petitioner showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail." Id. at p. 880. In Godfrey, the jury in its written findings, stated as the only aggravating circumstance supporting the death penalty, that the offense of murder was outrageously or wantonly vile, horrible or inhuman. The plurality opinion in Godfrey found that there was nothing in these few words standing alone, that implied any inherent restraint on the arbitrary and capricious infliction of the death sentence. In the instant case, however, the trial judge found the additional factor that

the murder involved depravity of mind. As the Georgia Supreme Court had implicitly recognized in Corn, supra, and as it has explicitly recognized in Fair v. State, supra and in Hance v. State, 245 Ga. 856, 861-863, 268 S.E.2d 339 (1980), cert. den., 449 U.S. 1067 (1980), rehng. den., 449 U.S. 1135 (1981), the phraseology of the (b)(7) aggravating circumstance must be considered in the disjunctive.

Petitioner's arguments, that previous decisions of the Georgia Supreme Court in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977) and in Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) have held that torture or aggravated battery must be found in addition to depravity of mind, misinterpret those cases. In the Blake opinion, the Georgia Supreme Court was simply enunciating that a jury finding under the entire (b)(7) aggravating circumstance left no room for a nonunanimous verdict, since any defendant who had engaged in the torture or aggravated battery of his victim also retained the depravity of mind contemplated by the statute. The court was not holding that in all cases to support a finding of depravity of mind, torture or aggravated battery must also be found. This is made explicitly clear in Fair v. State, supra and in Hance v. State, supra. Likewise, a careful reading of Harris v. State, supra, reveals no language which would require a finding of depravity of mind in all cases to be supported by torture or aggravated battery.

In conclusion, since there was ample evidence to support the trial judge's findings of aggravating circumstances under both Ga. Code Ann. § 27-2534.1(b)(2) and (b)(7) which sufficiently demonstrate that the trial judge's discretion in imposing the death sentence was controlled by clear and objective standards

so as to produce a nondiscriminatory and nondisproportionate application of the death penalty, this Court should not grant the writ of certiorari to review the issues raised under Petitioner's third argument.

IV. THE STATE DID NOT WITHHOLD FROM THE PETITIONER ANY MATERIAL, EXCULPATORY EVIDENCE RELATING TO UNDISCLOSED PROMISES OF LENIENCY WHICH HAD BEEN MADE TO ANY OF THE STATE'S WITNESSES.

Under the Petitioner's final argument, he contends that the state prosecutors allegedly suppressed favorable, material, and impeaching evidence concerning alleged promises of leniency which had been made to witness Michael Marable.

Witness Marable was called to testify as a state witness during the sentencing phase of the Petitioner's trial. He testified that he had been incarcerated in the Forsyth County, Georgia jail after he had been arrested for an escape from the Cobb County, Georgia jail where he was being held on A.W.O.L. charges. (T. 355-356). While incarcerated in the Forsyth County Jail Marable met Petitioner Fair and they subsequently escaped together. (T. 356). During the period of time that the Petitioner and Marable were out on escape, Fair made several incriminating admissions to Marable. He described how he had committed two murders, shooting both victims with their own guns. (T. 358-359). Fair admitted to Marable that the bodies of one of the victims had been driven into the lake in the back of a pickup truck and that the other victim had been burned, leaving only a thirty-nine inch torso. (T. 350-360). Marable further related that while he was with

Fair, Fair had engaged in a telephone conversation wherein he admitted that the victims deserved to die (T. 361). Fair also admitted to Marable that one of his accomplices had cut one of the victims' throats. (T. 367).

During the cross-examination of Marable, defense counsel asked whether he had been promised anything in return for his testimony. Marable answered that he had not, but he also admitted to defense counsel that he had admitted making the statement that he would be glad to testify against the Petitioner if it would help him out. (T. 366). Marable stated that he had not received anything in exchange for his testimony. (T. 366-367). On redirect examination by the state prosecutor, Marable stated that he was told that the Hall County prosecutor had nothing to do with the Forsyth County charges. (T. 367). Marable also stated that he had received five years to serve and five years on probation as a result of the Forsyth County charges, and that the maximum sentence which he could have received was forty-six years. (T. 369-370).

At the state habeas corpus hearing Petitioner called Michael Marable in support of his state petition. At that hearing, Marable related that he had spoken to the Hall County District Attorney, who had informed him that he would write a recommendation for Marable, but could not promise him anything. (HT. 43, 50, 51).

Former Assistant District Attorney Roland Stroberg also testified at the state habeas corpus hearing by way of deposition. Mr. Stroberg admitted that he spoke to witness

Marable prior to the Petitioner's trial, while Marable was incarcerated in the Forsyth County Jail. (DT. 4).[4/] Except for a brief occasion when Stroberg observed Marable and his mother at court, this was the only occasion that Stroberg had interviewed Marable. (DT. 5, 7). The Assistant District Attorney's conversation with Marable was tape recorded and transcribed and was provided to Mr. Fair's defense counsel prior to trial. (DT. 5, 8; T. 43). Stroberg stated emphatically that he had made no promises of leniency, nor did he have any knowledge that anyone else had made any such promises, other than those which were reflected in the transcribed interview which was served upon defense counsel. (T. 7, 8, 9). A review of that transcribed interview shows that indeed, Mr. Stroberg only told Marable that he could make no promises as to any pending charges in Forsyth or Cobb Counties, but that Marable's cooperation would be made known. Specifially, Stroberg told Marable:

> Now getting back to where we were talking about, getting back to you testifying, like I said, I ain't going, I'm not going to tell you, I never have told anybody that I can do anything for them cause I cain't, (sic) but all I'll tell you is that if you do get up there and testify, that we know it takes some guts and we will make it know (sic) to anybody that deals with any case that you have, that you didn't have

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4/ References to the pagination of the deposition of Roland Stroberg which was taken on July 29, 1981 shall be referred to as (DT._____).

> testify about this, I mean you know, I can have the judge order you to testify, whatever good that does. I know you don't have to testify and I know you're telling the truth cause there ain't no other way you could know about it, but if you testify and I know you're telling the truth cause there ain't no other way you could know about it, but if you testify we'll make it known to whoever is dealing with your cases and that's all I can do. (Interview Transcript, p. 27).

Stroberg also had told Marable that if he testified, that he would do anything he could to see that Marable was protected. (Id. at p. 28). As has previously been noted, this complete transcript was given to defense counsel prior to trial, and they had full knowledge as to the conversation between Stroberg and Marble. Strobe[illegible] also testified by way of his deposition that he made no representations and heard no intimations or inferences from anyone else that Marable's girlfriend would not be prosecuted. (DT. 16). At the time of Fair's trial, Stroberg had no idea as to the sentence which Marable received in Forsyth County, and was aware of no specific conditions that had been attached to that sentence. (T. 18). In fact, Stroberg did not contact the Forsyth County authorities, but was under the impression that the law enforcement officers in that county had made Marable's cooperation known to the Forsyth County Judge. (DT. 20).

Based on the aforesaid evidence which was presented the state habeas court simply concluded that there were no undisclosed promises or leniency which had been made to witness Marable. (See Petitioner's Appendix, p. 9).

Since there was no material, impeaching evidence withheld, Giglio v. United States, 405 U.S. 510 (1972), and Brady v. Maryland, 373 U.S. 83 (1963) were not violated.

For all of the aforesaid reasons, this Court should refuse to grant certiorari to review Petitioner's final argument.

CONCLUSION

For all of the aforesaid reasons this Court should refuse to grant the writ of certiorari because no sufficient reasons have been set forth by Petitioner to justify issuance of the writ.

Respectfully submitted,

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